# In the Supreme Court of the United States

OCTOBER TERM, 1964

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No. 852

PAN AMERICAN WORLD AIRWAYS, INC., AND THE TRAVELERS INSURANCE CO., PETITIONERS

*v.*

WILLIAM M. O'KEEFFE, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE DEPUTY COMMISSIONER

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The court below, on October 16, 1964, affirmed the deputy commissioner's finding that the death of a defense base employee, while he was engaged in recreational activity, arose out of and in the course of his employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, as amended, 33 U.S.C. 901, *et seq.*), as extended by the Defense Bases Act (56 Stat. 1035, as amended, 42 U.S.C. 1651, *et seq.*). Subsequently, in our supplemental memorandum in No. 307 (*O'Keeffe*

v. *Smith, Hinchman & Gryllis Associates, Inc.*) and No. 474 (*Pan American World Airways, Inc.* v. *O'Hearne*), we stated to this Court:

> On October 21, 1964, we advised the Court, by letter, as follows:
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> > In No. 307, the government has filed a petition alleging a conflict between the decision of the Fifth Circuit in that case and decisions of the Fourth and Ninth Circuits. In No. 474, petitioner Pan American seeks review of a Fourth Circuit decision relying upon the same conflict to which the government refers in No. 307. The government has expressed its acquiescence to a grant of the writ in No. 474.
> >
> > We have just received a copy of an opinion of the Fifth Circuit in a third case, *O'Keeffe* v. *Pan American World Airways*, C.A. 5, No. 20440, October 16, 1964 (copy attached). It appears from a preliminary examination that this latest opinion represents a modification of the Fifth Circuit's earlier views with respect to the issues involved. The opinion, however, is that of a panel of the court and we are not yet advised whether the losing party (Pan American) will seek a rehearing *en banc*.
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> > This letter is written to inform the Court of the recent development noted above—one which might affect its disposition of the two pending petitions—and to suggest that it would be appropriate to withhold action upon the petitions for a period of two weeks in order to afford all parties concerned an opportunity to submit their views by supplementary memoranda.

> We are now informed that counsel for Pan American will file a petition for rehearing *en banc* in case No. 20440. If this petition should be granted, the Fifth Circuit will be in a position to express itself definitively upon the issue which has led to a claim of conflict in the two cases pending before this Court. We accordingly suggest that it would be appropriate for this Court to hold the petitions in Nos. 307 and 474 pending the court of appeals' disposition of the petition for rehearing *en banc* to be filed in No. 20440.

The Fifth Circuit, on December 28, 1964, denied the petition for rehearing in No. 20440, the instant case (Pet. App. E-1). Accordingly, there remains unresolved the issue which has led to the asserted conflict in Nos. 307 and 474. In addition, there is apparently a difference of views within the Fifth Circuit. Although we believe that the decision below is correct, we agree with petitioner, for the reasons elaborated in our petition in No. 307, that the question should be definitively resolved by this Court. We accordingly acquiesce in a grant of the petition for a writ of certiorari in the present case.

Respectfully submitted,

ARCHIBALD COX,
*Solicitor General.*

February 1965

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